

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION**

**IN RE MENTOR CORP. OBTAPE
TRANSOBTURATOR SLING
PRODUCTS LIABILITY LITIGATION**

MDL No. 2004
Master Case No. 4:08-md-2004-CDL
Case No. 4-12-cv-00176 (Taylor)

**DEFENDANT MENTOR WORLDWIDE LLC'S MOTION TO STRIKE
DR. WILLIAM PORTER'S TESTIMONY FOR FAILURE TO DISCLOSE**

Mentor Worldwide LLC respectfully moves the Court to strike the testimony of Dr. William Porter, one of Plaintiff's experts. According to the Court's March 16, 2015 Scheduling Order, Plaintiff's expert reports were due May 4, 2015. Dr. Porter produced his Rule 26(a) expert report May 5, 2015. *See* Report of William Porter, M.D. (May 5, 2015), attached as Exhibit A. Dr. Porter was deposed on August 7 and 8, 2015. *See* Excerpts from the Dep. of William Porter, M.D. (August 8, 2015), attached as Exhibit B. Dr. Porter has never supplemented his report.

On February 11, 2016 in the trial of this matter, Dr. Porter took the stand and gave opinions dramatically different from, contradictory to, and not disclosed in, either his report or deposition. Plaintiff's counsel even prompted Dr. Porter to explain during his direct examination that his opinions had "evolved" and "changed" since his deposition. Once the case had been scheduled for trial, Plaintiff's counsel asked Dr. Porter to go through the records "with a fine toothed comb" which led to his new opinions. Direct Exam. of Dr. Porter, Trial, Feb. 11, 2016.

Under Fed. R. Civ. P. 26(a)(2) and this Court's Order, Plaintiff was required to provide Mentor with a complete statement of all opinions Dr. Porter would express, the basis and reasons for them, and the facts or data considered by Dr. Porter in forming them. Here, Dr. Porter provided his report nine months ago, gave a deposition six

months ago, and then waited until the eve of trial to “evolve” and “change” his opinions to suit Plaintiff’s story at trial, and failed to timely supplement his Report. *See* Fed. R. Civ. P. 26(a)(2)(E).

Mentor has been prejudiced. Dr. Porter’s new and changed testimony – which Mentor learned for the first time in open court as Dr. Porter testified – deprived Mentor of the ability to depose Dr. Porter to discover these opinions or to challenge his data and methods, including the reliability of his opinions under *Daubert*. It also deprived Mentor of the ability to fully prepare for trial, including the reports and testimony of its own experts.

Under Fed. R. Civ. P. 37(c), a party who fails to provide information or identify a witness as required by Rule 26(a) or (e) may not use that information or witness at trial, unless the failure was substantially justified or is harmless. It was neither here. Plaintiff’s counsel’s explanation that Dr. Porter did additional work at Plaintiff’s counsel’s request and arrived at new opinions “when this case was scheduled for trial,” is not substantially justified or harmless. This case was set for trial on November 17, 2105 at the pretrial conference, almost three months ago. Plaintiff had ample opportunity to supplement Dr. Porter’s report before trial and/or to make him available for a further deposition. Plaintiff instead chose to ambush Mentor in the middle of trial.

Mentor therefore requests that the Court strike Dr. Porter’s testimony in its entirety.

Dated: February 14, 2016

Respectfully submitted,

s/ John Q. Lewis

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CERTIFICATE OF SERVICE

A copy of the foregoing was served via ECF and email on the following counsel
this 14th day of February, 2016:

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